

LAUREN E. KOMSA (Bar No. 244438)
HILL RIVKINS LLP
45 Broadway, Suite 1500
New York, NY 10006
Telephone: (212) 669-0600
Facsimile: (212) 669-0678

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANK OATHOUT

Plaintiff,

- *Against* -

SCRIPPS INSTITUTION OF
OCEANOGRAPHY, UNIVERSITY OF
CALIFORNIA SAN DIEGO, THE REGENTS
OF THE UNIVERSITY OF CALIFORNIA, and
DOE DEFENDANTS 1-10,

Defendants.

Case No.: '11CV0498 W JMA

**COMPLAINT
FOR DAMAGES**

JURY TRIAL DEMANDED

GENERAL ALLEGATIONS

1. The Plaintiff, Frank Oathout (hereinafter "Plaintiff"), is and was at all times herein mentioned engaged in service as a seaman aboard the M/V ROGER REVELLE. The Plaintiff is a citizen of the United States and a resident of the State of Washington.

2. Defendant Scripps Institution of Oceanography (hereinafter "SCRIPPS"), is an entity owned or managed by the University of California, San Diego, a subsumed campus of the University of California System. The property of SCRIPPS is owned and governed by the Board of Regents of the University of California System with its principal place of business in Oakland, Alameda County, California. At all relevant times mentioned herein, SCRIPPS was and is a public entity organized and existing under the laws of the State of

1 California. SCRIPPS may be served at the office of General Counsel, 1111 Franklin Street,
2 8th Floor, Oakland, Alameda County, California 94607-5200.

3 3. Defendant, the University of California San Diego (hereinafter "UCSD"), is an
4 entity owned or managed by the Regents of the University of California, a subsumed
5 campus of the University of California System. The property of UCSD is owned and
6 governed by the Board of Regents of the University of California System with its principal
7 place of business in Oakland, Alameda County, California. At all relevant times mentioned
8 herein, UCSD was and is a public entity organized and existing under the laws of the State
9 of California. UCSD may be served at the office of General Counsel, 1111 Franklin Street,
10 8th Floor, Oakland, Alameda County, California 94607-5200.

12 4. Defendant, The Regents of the University of California (hereinafter "REGENTS")
13 is the governing body of the University of California System, including SCRIPPS. *See* Cal.
14 Const., art. IX, § 9. Under California Law and for all purposes herein, the REGENTS are
15 treated as the real party in interest for the University of California and its subsumed entities.
16 All University of California property is held by the REGENTS, all bank accounts are held in
17 the name of the REGENTS, and all lawsuits involving the University of California refer
18 specifically to the REGENTS. At all relevant times mentioned herein, REGENTS were and
19 are a public entity organized and existing under the laws of the State of California with it
20 principle place of business in Oakland, Alameda County, California. REGENTS may be
21 served at the Office of General Counsel, 1111 Franklin Street, 8th Floor, Oakland, Alameda
22 County, California 94607-5200.

24 5. Plaintiff is ignorant of the true names and capacities of Doe Defendants 1-10, sued
25 herein, inclusive, and therefore sues these defendants under such fictitious names. Plaintiff
26 will amend this complaint and insert their names and capacities when ascertained. Plaintiff
27 is informed and believes and thereon alleges that such fictitiously named defendants are
28

1 responsible in some manner for the occurrences herein alleged, whether agents or principals
2 of some or all of the other defendants, and were acting in the course and scope of their
3 authority.

4 6. By virtue of California Government Code § 905.6, the requirements of the
5 California Tort Claims Act do not apply to the Regents of the University of California.

6 7. Defendants are and were at all material times hereto the owners *pro hac vice* and/or
7 operators of the M/V ROGER REVELLE (hereinafter sometimes referred to as “the
8 vessel”) and used the vessel in maritime commerce.

9 8. The Defendants were at all times material hereto the employer of the Plaintiff.

10 9. The vessel’s homeport and regular berth is and was the Port of San Diego,
11 California.

12 10. This action is a suit on an admiralty and/or general maritime law claim under
13 federal law and the Jones Act, 28 U.S.C. § 1333 and 46 U.S.C. § 30104 *et seq.*

14
15 **FACTS**

16 11. The incident which is the subject of this lawsuit occurred upon navigable waters
17 while the Plaintiff was engaged in service as a seaman and ship’s officer, rated as a Second
18 Assistant Engineer, aboard the M/V ROGER REVELLE.

19 12. While in the course and scope of Plaintiff’s employment and duties as a seaman,
20 Plaintiff was injured on or about May 30, 2009.

21 13. Plaintiff was injured when he was ordered to enter a ballast tank to investigate the
22 malfunction of and clear a sounding tube in the ballast tank.

23 14. A ballast tank is a small, confined compartment at the bottom of a ship, which is
24 filled with liquid for stability and to make the ship seaworthy.

25 15. Sounding tubes are slender metal tubes used to calculate the depth of liquid in a
26 tank. The depth is calculated by lowering a metal sounding tape with a sinker to the bottom
27
28

1 of the tank. The sounding tape is coated with a chemical substance that indicates the depth
2 of the liquid in the tank.

3 16. The sounding tubes malfunctioned as a result of Defendants' failure to properly
4 maintain and/or repair same.

5 17. Plaintiff was ordered by his superiors to enter the ballast tank before Defendants
6 adequately inspected the space to ensure that it was safe for human entrance.

7 18. Defendants further failed to furnish Plaintiff with proper safety equipment prior to
8 his entry into the ballast tank.

9 19. Defendants further failed to furnish the ballast tank with adequate lighting, prior to
10 Plaintiff's entrance.

11 20. During the course of performing his duties and orders, Plaintiff slipped on sludge
12 on the slick surface of the bottom of the ballast tank and fell backwards into the frame of the
13 vessel. As a result of the foregoing, the Plaintiff sustained serious injuries, including to his
14 ribs, back, neck, shoulder, and teeth.

15 21. At the time of the Plaintiff's injuries, the vessel was underway and engaged in
16 seismic survey activity off the coast of Australia.

17 22. Immediately following Plaintiff's fall, the First Assistant Engineer informed the
18 Captain and Chief Engineer of the Plaintiff's injuries.

19 23. The Plaintiff sought needed medical attention and requested to be examined by a
20 doctor. Ignoring this request, the officers of the vessel did not provide proper medical
21 treatment for the Plaintiff.

22 24. Following Plaintiff's accident, although the ship's master and officers were aware
23 of Plaintiff's injuries, Defendants made no attempt to provide Plaintiff with necessary
24 medical treatment.

1 25. Although Plaintiff's injuries clearly required immediate medical attention, and
2 although Defendants had the resources to provide proper treatment both onboard or shore
3 side, Defendants did not provide necessary medical care to Plaintiff for nearly one month
4 (5/30/2009-6/23/2009), until the vessel called on the port of Darwin, Australia.

5 26. When the vessel arrived in Darwin, Defendants arranged for Plaintiff to be
6 examined by a doctor. The doctor conducted a minimal diagnostic evaluation, and failed to
7 diagnose and/or misdiagnosed Plaintiff's injuries.

8 27. As a result of Plaintiff's injuries, he was physically unable to continue his duties in
9 the engine room. As such, on or about June 27, 2009, Plaintiff disembarked the vessel.
10

11 28. Following his disembarkation from the vessel, Plaintiff continued to seek and
12 Defendants continually failed to provide, maintenance or proper medical care to Plaintiff.

13 29. Notwithstanding Defendants' acknowledgment of Plaintiff's seaman status, they
14 continued to deny Plaintiff's claim for maintenance and cure and/or instructed Plaintiff to
15 file a California Worker's Compensation Claim.
16

17 30. Despite Plaintiff's lawful demands, Defendants acted in bad faith and wrongfully
18 refused to pay Plaintiff maintenance. It was not November 13, 2009, after Plaintiff was
19 forced to hire an attorney to protect his rights, that Defendants began to pay Plaintiff's
20 maintenance.

21 31. To date, Defendant continues to act in bad faith by intentionally and consistently
22 delaying the approval of Plaintiff's medical care and the expenses arising therefrom.
23

24 32. As a result of Defendant's bad faith failure to pay Plaintiff's maintenance and cure,
25 many of Plaintiff's medical expenses have not been paid, resulting in the bills going into
26 collection.

27 33. The pain and stress from Plaintiff's injuries have caused mental illness including
28 depression and posttraumatic stress disorder.

34. As a direct and proximate result of Defendants' failure to provide a seaworthy vessel, Plaintiff sustained serious injuries. As a further direct and proximate cause of Defendants' negligence in failing to provide Plaintiff with treatment for his injuries, Plaintiff's injuries worsened, resulting in additional damages.

FIRST CAUSE OF ACTION
VIOLATION OF THE JONES ACT (46 U. S. C. § 30104 *et seq.*)

(As Against All Defendants)

35. Plaintiff repeats and re-alleges each and every allegation contained herein.

36. At all times material hereto, there was in effect an Act of Congress known as The Jones Act, 46 U. S. C. § 30104 *et seq.*, applicable to Defendants and its agents and employees.

37. At all times material hereto, Defendants had a non-delegable duty to provide the Plaintiff with a safe and seaworthy vessel and appurtenances, a seaworthy crew, and a reasonably safe place to work.

38. At all times material hereto, Defendant had the duty to ensure the safety and well-being of its crew, including by providing immediate medical assistance when it was required.

39. Defendants breached the aforementioned duties by, *inter alia*,:

- a. Failing to properly maintain and repair the sounding tubes aboard the vessel;
- b. Failing to adequately inspect the ballast tank to ensure that it was safe for human entrance;
- c. Failing to provide Plaintiff with proper safety equipment prior to his entry into the ballast tank;
- d. Failing to furnish the ballast tank with adequate lighting prior to Plaintiff's entrance;

1 e. Ordering Plaintiff to enter the dangerous ballast tank without adequate safety
2 precautions; and

3 f. Failing to provide Plaintiff with proper medical care and attention after he was
4 injured as a result of the aforementioned breaches.

5 40. As a direct and proximate result of Defendants' negligence, including the
6 negligence of Defendants' agents and employees, Plaintiff has suffered and continues to
7 suffer from serious personal injuries, pain and suffering, mental illness, scarring, permanent
8 loss or diminution of use of body functions, permanent physical impairment, lost wages,
9 loss of ability to perform household services, loss of consortium, loss of earning capacity,
10 found, past and future out-of-pocket medical expenses, and other expenses proximately
11 resulting from his injuries.
12

13 **SECOND CAUSE OF ACTION**
14 **UNSEAWORTHINESS**

15 **(As Against All Defendants)**

16 41. Plaintiff repeats and re-alleges each and every allegation contained herein.

17 42. Pursuant to the General Maritime Law, Defendants had an absolute and non-
18 delegable duty to provide the Plaintiff with a safe and seaworthy vessel and appurtenances,
19 a seaworthy crew, and a reasonably safe place to work.
20

21 43. Defendants breached this duty by failing to provide a safe and seaworthy vessel
22 and crew, and a reasonably safe place to work in the following ways:

23 a. Failing to properly maintain and repair the sounding tubes aboard the vessel;

24 b. Failing to adequately inspect the ballast tank to ensure that it was safe for human
25 entrance;

26 c. Failing to provide Plaintiff with proper safety equipment prior to his entry into the
27 ballast tank; and
28

1 d. Failing to furnish the ballast tank with adequate lighting prior to Plaintiff's
2 entrance.

3 44. As a direct and proximate result of the unseaworthiness of the M/V ROGER
4 REVELLE, its crew and appurtenances, Plaintiff has suffered and continues to suffer from
5 serious personal injuries, pain and suffering, mental illness, scarring, permanent loss or
6 diminution of use of body functions, permanent physical impairment, lost wages, loss of
7 ability to perform household services, loss of consortium, loss of earning capacity, found,
8 past and future out-of-pocket medical expenses, and other expenses proximately resulting
9 from his injuries.
10

11 **THIRD CAUSE OF ACTION**
12 **MAINTENANCE AND CURE**

13 **(As Against All Defendants)**

14 45. Plaintiff repeats and re-alleges each and every allegation herein.

15 46. Pursuant to the General Maritime Law of the United States, Defendants have an
16 absolute and non-delegable duty to provide Plaintiff with maintenance and cure from the
17 date of his injury until maximum care is reached.
18

19 47. Plaintiff was injured while in the service of the ship.

20 48. Defendants are indebted to the Plaintiff for past and future maintenance benefits at
21 a daily rate to be set by this Court until maximum cure is achieved, and for all costs of the
22 care incurred.
23

24 49. Plaintiff is further entitled to lost wages for the remainder of the voyage or the end
25 of the Plaintiff's contract and for transportation to the port of engagement.

26 50. Plaintiff is further entitled to compensatory damages as result of Defendants'
27 delayed payment of maintenance and cure.
28

51. Plaintiff was forced to hire an attorney to pursue maintenance and cure and may recover attorney's fees for Defendants' refusal and failure to maintenance.

52. Plaintiff may recover punitive damages for his employer's willful and wanton failure to pay maintenance and cure, and the Jones Act does not preclude such damages.

WHEREFORE, Plaintiff prays as follows:

1. For trial by jury;
2. For judgment against Defendants, jointly and severally, for all injuries and damages he has suffered as a consequence of the Defendants' culpable conduct;
3. For judgment against Defendants for maintenance and cure;
4. For pre-judgment and post-judgment interest at the legal rate;
5. For exemplary damages in an amount sufficient to punish Defendants and to deter such conduct in the future;
6. For costs of suit herein incurred, including reasonable attorneys' fees; and
7. For such other further relief as the court may deem just and proper.

Respectfully submitted,

DATED: 3/11/2011

HILL RIVKINS LLP

By: /S/ Lauren E. Komsa
Lauren E. Komsa (Bar No. 244438)
Attorney for Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Frank Oathout

(b) County of Residence of First Listed Plaintiff Gray Harbor (OR)
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Hill Rivkins LLP, 45 Broadway Ste. 1500
New York, NY 10006 (212) 669-0600

DEFENDANTS

Scripps Institution of Oceanography, University
of California San Diego, The Regents of the
University of California, and Does 1-10
County of Residence of First Listed Defendant Alameda

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

'11CV0498 W JMA

H. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input checked="" type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
The Jones Act 46 U.S.C. 30104

Brief description of cause:

Plaintiff was injured while employed as a seaman

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

\$ 3 million

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

03/11/2011

SIGNATURE OF ATTORNEY OF RECORD

/s/ Lauren E. Komsa

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE